No. 88-6613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD BOYDE,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The California Supreme Court

PETITIONER'S REPLY BRIEF

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At the penalty stage of his capital trial, petitioner introduced considerable evidence in mitigation that was not immediately related to his crime. This included a difficult and deprived childhood, unsuccessful efforts to obtain help for his intellectual deficiencies and psychological problems, and his redeeming personal qualities—that he was a hard worker, a good husband and father, a kind and generous person. Respondent does not dispute that the sentencing instructions precluded the jury from considering this evidence unless the evidence fit within one of the specified categories of circumstances to which the jury's penalty deliberations were restricted. Nor does respondent claim that petitioner's mitigating evidence could have fit within any of the specified categories other than the one defined by the now-defunct factor (k) instruction. Thus, the *Lockett* issue in this case boils down to the question whether the factor (k) instruction would have been understood by the jury as permitting consideration of all of petitioner's mitigating evidence.[1]

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[1] Respondent does not dispute that petitioner was constitutionally entitled to have this evidence considered in mitigation. Every member of this Court has endorsed the view that mitigating evidence unrelated to the crime for which a capital defendant is being sentenced must be considered. See *South Carolina* v. *Gathers*, 490 U.S. ____, 104 L.Ed.2d 876, 887 (1989) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting); *Skipper* v. *South Carolina*, 476 U.S. 1, 4-5 (1986) (White, J., joined by Brennan, Marshall, Blackmun, Stevens, and O'Connor, JJ.); *Penry* v. *Lynaugh*, 492 U.S. ____, 106 L.Ed.2d 256, 303 (1989) (Scalia, J., joined by Rehnquist, C.J., White and Kennedy, JJ., dissenting) (citing *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987) and *Skipper* v. *South Carolina*, *supra*).

Respondent does assert that the constitutionality of the former factor (k) instruction was decided adversely to petitioner in *Califor-*

Respondent claims that it would. The following subsections respectively demonstrate (a) that respondent's interpretation of the factor (k) instruction is incompatible with the language of the instruction; (b) that the context of the instruction would not permit it to be read as encompassing petitioner's mitigating evidence; (c) that other instructions did not cure the unconstitutionally narrow factor (k) instruction; and (d) that the arguments of counsel did not do so.

A. Respondent's Reading Of The Former Factor (k) Instruction Is Belied By The Instruction's Plain Language.

Respondent claims that the former factor (k) instruction was a "catchall" that allowed petitioner's jury to consider his mitigating evidence. RB 14, 29, 41 n. 12. The plain words of the instruction belie this claim. The instruction permitted the jury to consider only evidence "which extenuates *the gravity of the crime* even though it is not a legal excuse for *the crime*."[2] This language might have been understood to be a catchall for *crime-related* mitigation, but it would not reasonably have been interpreted as a catchall for mitigation *extraneous* to the crime.[3]

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nia v. *Ramos*, 463 U.S. 992, 1004 n. 19 (1983). But no issue concerning the validity of factor (k) was before the Court in *Ramos* (or in any other decision of the Court), nor was the Court called upon to determine whether a jury instructed under factor (k) before *People* v. *Easley* would understand the scope of mitigation to cover the kinds of mitigation that petitioner offered.

[2] It is not surprising that the factor (k) instruction failed to convey the proper range of mitigating factors because the statutory language that it tracked, see Cal. Penal Code, § 190.3(k), was irrevocably set in an initiative measure finalized before this Court's decision in *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

[3] That reasonable jurors would understand the language of the former factor (k) instruction as precluding consideration of non-crime-related mitigation is confirmed by the fact that this interpretation was widespread among prosecutors and judges throughout the

A reasonable juror would surely not think that the "gravity of the crime" committed by petitioner was in any way lessened by the fact that petitioner was a person of value,[4] that he was kind to his family and friends, or that he had intellectual handicaps and a history of childhood deprivation. Such evidence is, as members of this Court have recognized, "extraneous to the crime itself" and not "directly relevant to" it. *South Carolina* v. *Gathers*, 104 L.Ed.2d at 887 (O'Connor, J., dissenting). The evidence may indeed have called for a sentence less than death, but it did so *in spite of* the gravity of the crime. Thus, factor (k) provided no vehicle for the jury to consider this evidence in mitigation.

Respondent asserts that because the jury had been told at the outset of the penalty instructions that it would now have to determine petitioner's penalty, the jury would have interpreted "the gravity of the crime" to mean "the appropriate penalty," RB 33. This assertion is insupportable. First, despite respondent's efforts to portray it in a different light, the earlier language was merely a general introduction telling the jurors that they would have to choose a penalty. RT 4831:22-23. In no way did this instruction inform them as to *what* the law would allow them to consider in making the penalty determination. Second, the phrase "gravity of the crime" is simply not equivalent to "appropriate penalty." "Crime" does not mean "punishment." "Gravity" is not a synonym for "appropriateness." There is

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state before the instruction was modified by *People* v. *Easley*, 34 Cal.3d 858 (1983). *Amicus* Brief of the California Appellate Project (hereafter, "CAP *Amicus*") 12-17. Respondent argues that other persons' understandings of the language of factor (k) are irrelevant to how the jury understood factor (k) in petitioner's case. Respondent's Brief (hereafter "RB") 57. But seeing how other reasonable persons interpreted the unadorned words of factor (k) is indicative of how reasonable jurors at petitioner's trial would have interpreted those same words in the factor (k) instruction they received.

[4] See RT 4820 (prosecutor's argument to penalty jury).

nothing in the introductory instruction that would lead a reasonable juror to conclude otherwise.

B. Far From Supporting Respondent's Argument, The Context Of The Factor (k) Instruction Reinforced The Jury's Understanding That Only Crime-Related Mitigation Could Be Considered.

Respondent argues that the context of the factor (k) instruction expanded its inherent meaning. RB 34-36. To the contrary, the context *reinforced* the message that factor (k) was limited to crime-related mitigation. All of the other enumerated mitigating factors at petitioner's trial were expressly limited to the crime itself, so that a reasonable juror would have concluded that factor (k)'s use of similar wording (extenuating the gravity of "the crime") was likewise limited. See Petitioner's Brief (hereafter "PB") 19-20; CAP *Amicus* 10-12.

Respondent argues that because two enumerated *aggravating* factors—factors (b) and (c), involving prior felony convictions and prior violent crimes—were not related to the circumstances of the crime, factor (k) would likewise be understood to permit consideration of mitigation unrelated to the crime. RB 35-36, 38-39. This is a non-sequitur.

First, these two aggravating factors would be understood from their very terms as applying to matters other than the crime on trial. As a result, if factor (k) also applied to non-crime-related matters, a juror would expect to be alerted to such authorization by that factor's plain words. No such words appear.

Second, factors (b) and (c) allow only two *limited* kinds of background matters to be used in aggravation, i.e., specific instances of prior criminality; they do not allow consideration of general bad character. Thus, they do not open up aggravation in the way that the Constitution requires mitigation to be opened up. The listing of two *specific* kinds of background aggravation in factors (b) and (c) would hardly induce a reasonable juror to conclude that factor (k) allows the jury to consider,

"as a mitigating factor, *any* aspects of defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (emphasis added).

Moreover, there is a qualitative difference between enhancing a sentence on the basis of *specific criminal acts* and ameliorating a sentence on the basis of *general* positive or sympathetic *background traits*. A reasonable juror would view a provision to enhance punishment based on prior crimes to be a natural part of a "tough" and "effective" death penalty law like California's. See Official Cal. Voters Pamp., Gen. Election (Nov. 7, 1978) at 34.[5] However, a juror would not expect general *non*-crime-related mitigation (such as a defendant's difficult upbringing, low intelligence, value and kindness to his friends and family) to be an inherent feature of such a law. Thus, a juror's understanding that some specific criminal acts could be weighed in aggravation would not, by any natural reasoning process, lead the juror to deduce that a very general kind of background evidence could be weighed as independent mitigation. Certainly, this deduction would not be drawn in the face of an instruction explicitly limiting mitigation to matters that extenuate "the gravity of the crime."

Next, starting from the premise that "there was no prosecution evidence which was not properly considered under the statutory aggravating factors (a), (b) and (c)," respondent argues that "[t]he jury could not have reasonably believed it must ignore *petitioner's* background and character evidence, while giving weight to the *prosecution's* background and

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[5] In determining the meaning or purpose of an initiative measure, California courts have long relied on arguments made by the proponents of the measure in the official voter pamphlet. See, e.g., *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization*, 22 Cal.3d 208, 245-46 (1978); *Carter* v. *Seaboard Finance Co.*, 33 Cal.2d 564, 580-81 (1949); *Carter* v. *Com. on Qualifications, etc.*, 14 Cal.2d 179, 185 (1939).

character evidence." RB 43, 40. This reasoning is flawed on several levels.

First, contrary to respondent's assertion, the prosecution most certainly *did* adduce aggravating evidence that was not properly considered under any statutory aggravating factor. As the California Supreme Court held below,

> [m]ost of the [aggravating] evidence presented about Boyde's CYA commitment and parole falls into this category [of impermissible aggravation]. The same may be said for testimony by officers about Boyde's untruthfulness, possession of stolen property and possession of marijuana in jail. Also improper was testimony by victims of other offenses about the impact that the event had on their lives.

People v. *Boyde*, 46 Cal.3d 212, 249 (1988).[6] If the prosecution thus adduced aggravating evidence that plainly fell outside the enumerated factors, a reasonable juror could easily have concluded that defense evidence also lay beyond the scope of those factors.[7]

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[6] The court found that these errors did not require reversal, *id.* at 250, but that finding is immaterial for purposes of the present discussion.

[7] "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry* v. *Lynaugh*, 492 U.S. ____, 106 L.Ed.2d 256, 278 (1989); see also *Hitchcock* v. *Dugger*, 481 U.S. 393, 398-399 (1987), *Eddings* v. *Ohio*, 455 U.S. 104, 113 (1982), *id.* at 119 (O'Connor, J., concurring), *Gregg* v. *Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion).

In both *Penry* and *Hitchcock*, the sentencer had heard substantial mitigating evidence. This Court nonetheless reversed, because no provision in the death penalty law as applied at trial permitted the sentencer to give effect to that evidence. Respondent does not attempt to reconcile its current argument with these decisions. Indeed, Respondent's Brief does not attempt to distinguish *Hitchcock* at any point whatsoever.

Second, respondent's argument fails on its own terms. That the aggravating evidence fell within the issues framed for the jury's consideration by the sentencing instructions would not lead a reasonable juror to conclude that all of the defense evidence did, too. The *defense* evidence was of a qualitatively different nature (see *ante*); the factor (k) instruction expressly told the jury that only evidence "which extenuates the gravity of the crime" could be considered; and the prosecutor consistently emphasized to the jury, from voir dire through penalty argument, that the express instructional limitations upon the mitigating evidence which the jury could lawfully consider were strict and specific. See subsection I.D., *infra*.

Next, respondent points to two enumerated mitigating factors, factors (d) and (h), which authorize consideration of "extreme mental or emotional disturbance" and "impaired capacity," and notes that these factors would allow the admission of background evidence of a defendant's history of mental problems. From this, respondent argues that "the jury would have known that it was free to consider petitioner's background and character evidence in determining the appropriate penalty." RB 37. In fact, however, the jurors were specifically instructed to consider this evidence as mitigation under factors (d) and (h) only insofar as it related to the defendant's mental state at the time of "the offense."[8] Thus, rather than establishing that non-crime-related evidence could be given "*independent* mitigating weight," *Lockett*, 438 U.S. at 605, the factor (d) and (h) instructions reinforced the notion that only mitigation related to the crime could be considered.

C. Respondent's Reliance On The Instruction To "Consider All Of The Evidence" Distorts The Obvious Purpose Of The Instruction And Is Inconsistent With Precedent.

Respondent claims that the jurors would have understood factor (k) to be a "catchall" for non-crime-related evidence

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[8] The instructions given on factors (d) and (h) were both explicitly so limited. See RT 4832, J.App. 34.

because a separate instruction—*not* among the eleven enumerated factors—advised the jury to "consider all of the evidence which has been received during any part of the trial of this case." RB 33-34; see RT 4831:25-26, J.App. 33. But this instruction merely informed the jury to review all the evidence admitted and to consider whether it fell within the eleven enumerated penalty factors. It told the jury the *sources* of the evidence that the jurors could "consider" in determining, for example, whether there were any circumstances which "extenuate[d] the gravity of the crime." If, however, the evidence did not fit within any enumerated factor because it was unrelated to the crime, the jurors would have understood they could neither weigh it nor give it independent mitigating effect, because they were allowed to weigh and give effect only to the eleven factors "upon which you have been instructed." RT 4836:7-9, J.App. 35.

In both *Lockett* v. *Ohio* and *Penry* v. *Lynaugh*, *supra*, this Court found that a sentencer's ability to respond to mitigating evidence was unconstitutionally curtailed despite the fact that the sentencer was authorized to consider all the evidence. In neither case was a directive to consider all the *evidence* viewed as altering the scope of the specific *factors* enumerated for the sentencer's consideration. See PB 23-24, CAP *Amicus* 19 n. 11.

Respondent also notes that the jury was instructed that "extenuate" means "to lessen the seriousness of the crime as by giving an excuse." RB 32; see RT 4833, J.App. 34. This instruction did nothing to solve the basic problems of the factor (k) instruction. To begin with, the definitional instruction only made factor (k) more convoluted: combining it with the factor (k) instruction yields a directive to the jury to consider "any other circumstance which lessens the seriousness of the crime as by giving an excuse [for] the gravity of the crime even though it is not a legal excuse for the crime." As the prosecutor told the jury, "[defense counsel] agrees with me [that it] doesn't make any sense . . ." RT 4815:22-25. Moreover, because the definitional instruction spoke in terms of the seriousness of,

and excuses for, "the crime," it only reinforced the focus of factor (k) on the crime itself.

D. Respondent's Fallback Reliance On The Arguments Of Counsel Is Not Only Legally Incorrect But Also Ignores Or Mischaracterizes The Crux Of Those Arguments.

Finally, respondent asserts that the arguments of counsel, particularly the prosecutor, would have led the jury to understand that it could consider non-crime-related mitigating evidence despite the language of the former factor (k) instruction. RB 43-47. Even on its face, respondent's position is flawed. The factor (k) instruction was explicit in restricting the kind of mitigating evidence that the jury was permitted to consider, and "arguments of counsel cannot substitute for [correct] instructions by the court." *Taylor* v. *Kentucky*, 436 U.S. 478, 488-489 (1978).

But by no means did the prosecutor express a view of mitigation that was consistent with *Lockett*. Indeed, his position, repeatedly stated in both voir dire and final argument, was that mitigating factors were distinctly limited.

During voir dire, the prosecutor consistently espoused the view that the factors to be weighed were "strict," RT 1791, and "specific," RT 436. See also RT 436, 1159 (J.App. 9), 1280. His arguments at the penalty phase built upon those premises.[9] There he emphasized that the jurors were limited to the list of

[9] Respondent asserts that the voir dire remarks were "too far removed" from the penalty instructions to be pertinent, RB 48, citing *Darden* v. *Wainwright*, 477 U.S. 168, 183 n. 15 (1986). But the remarks at issue in *Darden* were not merely *uttered* at the guilt phase, they purported to apply only to the guilt phase. By contrast, the prosecutor's voir dire remarks in petitioner's case were *intended to* apply to the penalty determination. Moreover, the prosecutor's penalty argument specifically reminded the jurors of "the extensive voir dire process" and of the questions that the prosecutor had asked on voir dire concerning their ability to follow the strictures of the law. RT 4778-79.

eleven factors, which he posted on a board. RT 4765, 4766 (J.App. 20), 4768 (J.App. 21), 4821. Then he told the jurors that they could *not* weigh factors such as whether or not petitioner might be rehabilitated or might change, because "it is not one of the factors upon that board, doesn't [sic], not mentioned at all." RT 4819. Also "not a factor" was whether petitioner had been trying to destroy himself out of self-hate. RT 4817. After stating that the jurors were required to try to "completely filter out all [their] emotions, make the decision on a rational basis," RT 4817, J.App. 27, the prosecutor equated virtually all of petitioner's evidence to "things that get people's sympathy," RT 4817-18.

Ultimately, the prosecutor argued that the jury could not even consider petitioner's qualities which made him "someone of value," whose execution would be "a loss to all of us," because that type of consideration "*is not on the list*" of enumerated factors. RT 4820, emphasis added. The prosecutor thus nullified virtually the entire thrust of petitioner's mitigating evidence.[10]

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[10] Respondent repeatedly asserts that the prosecutor "never suggested that the jury could not consider, as a matter of law, any of petitioner's evidence in mitigation." RB 44, 45, 47. In light of the prosecutor's arguments just quoted in text, this assertion can be dismissed as patently incorrect.

Respondent makes a similar claim about defense counsel's argument, RB 44, but the claim is wrong for the same reason. Defense counsel agreed that all of the matters mentioned by the prosecutor were "not for consideration of factors for the jury [sic]." RT 4827, 4783-84. Elsewhere, respondent purports to quote defense counsel's comment to the jury that factor (k) was "almost a catchall phrase." RB 24 n. 7, 44; see RT 4829, J.App. 31. (Respondent conveniently omits the word "almost.") But defense counsel's acquiescence in the prosecutor's argument that the jury could not weigh whether petitioner was someone of value, RT 4820, 4827, makes clear that counsel was saying only that factor (k) was a catchall for factors relating to the crime itself.

II. THE JURY INSTRUCTION (SINCE ELIMINATED) REQUIRING A VERDICT OF DEATH WHENEVER AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES PRECLUDED THE JURY FROM MAKING A REASONED MORAL JUDGMENT REGARDING THE APPROPRIATENESS OF THE DEATH PENALTY FOR PETITIONER.

The following subsections respectively (a) refute respondent's mistaken imputation that petitioner is arguing for grafting a new and additional procedural requirement upon the capital sentencing process; (b) demonstrate that a range of factual situations exists, including the facts of this case, in which California's former mandatory sentencing instruction results in an unwarranted and unconstitutional death sentence; and (c) reveal the invalidity of respondent's argument that the mandatory sentencing instruction has constitutional virtues.

A. Respondent Mistakenly Imputes To Petitioner An Argument For A New Procedural Requirement On The Capital Sentencing Process.

Respondent repeatedly mischaracterizes petitioner's position[11] as urging a new sort of constitutionally required jury instruction to the following effect: "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that death is the appropriate punishment." But this is *not* petitioner's argument.

Petitioner's argument has always been that, to comport with the Eighth Amendment, the penalty jury must be permitted to make a reasoned moral judgment that the death penalty is the

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[11] For example, respondent asserts that "[p]etitioner argues that the constitution mandates that the jury make two separate determinations: aggravation outweighs mitigation and a *separate* and *independent* determination that death is the 'appropriate' penalty," RB 25; the same tenor of characterization is repeated at RB 78, 81, 86, and 91.

appropriate punishment in a particular case. The various states are free to honor this constitutional command by structuring the jury's penalty deliberations in any manner not inconsistent with it, ranging from the "hands-off" approach upheld in *Zant* v. *Stephens*, 462 U.S. 862, 880 (1983), to a weighing formula or metaphor that guides the jury's evaluation of the evidence, see *Proffitt* v. *Florida*, 428 U.S. 242 (1976). Petitioner has *never* argued that the Eighth Amendment requires an affirmative instruction to the effect that "you must not return a death sentence unless you make a separate and independent finding that it is the appropriate penalty in light of all the circumstances."[12] Rather, the constitutional bottom line on which petitioner's modest argument rests is simply that the state may not impose a procedure or instruction which *conflicts* with and *constrains* the jury's capacity to render its penalty decision consistent with its reasoned moral response to the evidence.

Specifically, petitioner objects to the mandatory, mechanistic sentencing instruction given at his trial on the ground that it unconstitutionally confined the jury's penalty deliberations in such a way as to *forbid* the jury to make the reasoned moral response that the Eighth Amendment requires. This unconstitutional restriction could have been eliminated simply by substituting the permissive verb "may" for the mandatory directive "shall," as was done in Alameda County with the effects described in the CAP Amicus at pages 27-29. The California Supreme Court has, of course, undertaken a more extensive repair of the defective instruction in *People* v. *(Albert) Brown*, 40 Cal.3d 512 (1985); but petitioner is not arguing that *Brown's* particular solution to the problem is constitutionally compelled.

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[12] An instruction of that nature would of course be one permissible way to cure the constitutional vice that infected petitioner's penalty trial. Similar instructions are in fact used in other states, see e.g., *State* v. *McDougall*, 301 S.E.2d 308, 327-328 (N.C. 1983); *State* v. *Ramseur*, 524 A.2d 188 (N.J. 1987).

Respondent's mischaracterization of petitioner's position must therefore be put aside as a distraction from the reality of this case. The former mandatory sentencing instruction is unconstitutional because it intrudes upon and conflicts with the well established core of this Court's Eighth Amendment jurisprudence, not because it fails to include some new and additional constitutional right recently concocted by petitioner. There are two minimum standards that a state must meet in structuring its capital sentencing process: (1) it must establish narrowing criteria which distinguish capitally eligible cases from the mass of noncapital murders; and (2) it must permit the defendant to introduce, and permit the sentencer to consider, all relevant evidence in mitigation. Beyond these two affirmative requirements, there are certain things that a state must *refrain* from doing. For example, a state may not inject the issue of race into the process by specifying the race of the victim as a factor to be considered in aggravation. Similarly, the state must refrain from forbidding the sentencer to make a reasoned moral judgment as to whether "death [is] an appropriate sentence," *Sumner* v. *Shuman*, 483 U.S. 66, 80 (1987), after considering all of the relevant sentencing evidence. Petitioner seeks only to rectify a jury instruction given at his trial which had this latter effect, not to graft any new tests, procedures, instructions, or other paraphernalia onto the capital sentencing process.[13]

B. Respondent Ignores The Realistic Risk That California's Former Mandatory Sentencing Instruction Required The Jury To Impose A Death Sentence In Cases In Which The Jury Did Not Conclude That Death Was The Appropriate Punishment.

At page 29 of his brief, petitioner proffered an illustrative scenario to show how a jury instructed that "[i]f you conclude

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[13] Thus, petitioner's position is distinguishable from that cited by respondent, RB 79, and rejected in *Franklin* v. *Lynaugh*, 487 U.S. ____, 101 L.Ed.2d 155, 169 (1988) that the petitioner was entitled to a separate jury instruction authorizing the jury to cast an "independent" vote against the death penalty regardless of its answers to the Texas penalty questions.

that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death" would be compelled to return a death verdict in situations where the jury's reasoned moral response to the evidence was that the aggravating circumstances fell short of calling for a death sentence and that the mitigating circumstances, considered in the light of the aggravating circumstances, were sufficient to warrant a life sentence. Respondent purports to find fatal flaws in this scenario. RB 91 n. 21.

Respondent urges that "first, [the scenario] . . . does not state whether the jury has applied the weighing process and actually determined that the factors in aggravation outweigh those in mitigation, which is the statutory standard." To the contrary, the scenario *does* suppose that the jury has applied the weighing process and that the mandatory instruction has nevertheless compelled it to impose a death sentence in a case in which, without the instruction, the jury would *not* conclude "that death is the appropriate punishment in the specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). This assumption, moreover, is well founded.

Take, for example, a case in which the circumstances of the crime and the other aggravating circumstances relied on by the prosecution present a picture of substantial aggravation but not of aggravation so extreme that the case calls compellingly for a death sentence. Suppose that in this case only one type of evidence is presented in mitigation—evidence regarding the defendant's good and nonviolent institutional adjustment during a prior prison term and while in custody awaiting the capital trial. This type of evidence is unquestionably cognizable in mitigation. *Skipper* v. *South Carolina*, 476 U.S. at 4-5. While a rational jury would certainly find that good institutional adjustment was a factor to be considered in mitigation in the penalty determination, it defies reality to think that the same rational jury would find that the prognosis of good prison performance (hardly an exalted avocation) would *outweigh* the taking of human life inherent in the capital murder.[14] However,

[14] Under California law and jury instructions, the circumstances of the offense are explicit aggravating factors which the jury must consider in determining the penalty.

it is entirely possible that the jury would conclude that, although aggravation outweighed mitigation in any ordinary sense, the defendant's evidence of good institutional adjustment was more than sufficient to justify a life sentence as a reasoned moral response to the evidence. Indeed, penalty juries often take a very practical view of the penalty choice and see the defendant as a walking disaster on the street but a redeemable risk in prison. However, under California's former mandatory sentencing instruction, no amount of *Skipper* mitigation could *ever* lawfully result in a life verdict because of the inherent disparity between the mitigating weight attached to even the very best of prison conduct compared with the inherent weight of even the least aggravated of capital murders. Respondent's suggestion that any case in which a jury could find that life instead of death is the appropriate sentence is *eo ipso* a case in which the jury would also find that mitigation "outweighs" aggravation is, quite simply, wrong.

Petitioner's own case presents a less obvious but equally valid example of a situation in which the jurors could have felt obligated by the court's instructions to return a death sentence that was *inconsistent* with their reasoned moral response to the aggravating and mitigating evidence. The jurors in petitioner's case could have reacted to the aggravating evidence by concluding that, while substantial, it did not demand the imposition of the death penalty because the evidence of petitioner's criminal history revealed petitioner as a man who was very much an *atypical* criminal—a robber whose crimes demonstrated a solicitude for the victims that is not usually found in the typical robbery scenario, as well as an ambivalence about his criminal conduct.[15]

[15] Consider the evidence. The victim of the July 1976 robbery testified that when he was obviously upset during the course of the offense, petitioner tried to calm the victim down with conversation and later offered him a cigarette. RT 2344. The victim of the 1981 robbery testified that petitioner tried to explain the reason for the robbery during the course of the offense and later asked the victim if he was hungry and bought him a doughnut. RT 2401-06. Petitioner

Because of petitioner's atypical conduct during these prior robberies, the jury could have found the aggravating evidence insufficient to call for the death penalty, in the light of petitioner's other mitigating evidence relating to the pervasive deprivations which afflicted his upbringing and which he made definite efforts to overcome. However, this conclusion might well *not* take the form of a finding that mitigation "outweighed" aggravation. Instructed that it *must* return a death verdict if aggravation "outweighed" mitigation, petitioner's jury would thus have felt compelled to sentence him to die even though the jury's *reasoned moral response* to all the pertinent evidence was that life was the appropriate sentence.

Respondent next asserts that petitioner's illustrative scenario "assumes that the jury had not exercised any moral judgment in evaluating the factors in aggravation and mitigation or in weighing them against each other, contrary to the requirement of California law." RB 92. Respondent appears to be confounding "the requirement of California law" as subsequently explicated in *People* v. *Brown*, *supra*, with the instructional rules given in pre-*Brown* cases. What petitioner assumes is that the jury did not exercise any moral judgment in conformity with the requirement of California law *later* articulated in *People* v. *Brown*, *supra*. While *Brown* now permits the jury to exercise moral judgment in evaluating and weighing aggravating and mitigating factors, petitioner's jury labored under the unadorned mandatory instruction. Petitioner's whole point is that the categorical pre-*Brown* mandatory sentencing instruction *precluded* the jury from making a reasoned moral response to the overall evidence in aggravation and mitigation. Respondent's attempt to finesse the problem by invoking California's subsequent repair of the problem must be rejected.

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also told him that petitioner was pretty sure he would get caught, and when he told petitioner that he would *not* give the police a false description, petitioner simply kept walking down the street with him.

Respondent further criticizes petitioner's scenario because "it assumes that a juror who concluded that the circumstances in aggravation outweighed those in mitigation, but who believed death was not the appropriate penalty, would not undertake to *reweigh* the circumstances in aggravation and mitigation to determine whether the jury really believed in the exercise of the juror's moral judgment, that the circumstances in aggravation outweighed those in mitigation." RB 93; emphasis in original. In other words, respondent criticizes petitioner's assumption that jurors would not finagle their figures to reach a desired bottom-line outcome. Respondent again correctly identifies an assumption in petitioner's argument, but fails to demonstrate its falsity. To the contrary, the assumption is supported by both case law and common sense. See, *e.g.*, *Francis* v. *Franklin*, 471 U.S. 307, 324-25, n.9 (1985); *Gregg* v. *Georgia*, 428 U.S. 192-93. Following the unadorned mandatory sentencing instruction, and particularly in the context of the prosecutor's intensive catechism regarding the operation of this instruction during voir dire, the jury would manifestly have felt *forbidden* by law to reevaluate the weights attached to the aggravation and mitigation as a means of tempering the ultimate sentencing decision. The precise point of the prosecutor's voir dire, the sentencing instruction, and the prosecutor's penalty argument was to eliminate any such outcome-oriented deliberation process. Respondent asserts that even if the mandatory sentencing instruction overrode a jury determination that death was *not* the appropriate punishment, no constitutional right of petitioner's was violated. RB 92 n.1. However, *Penry* v. *Lynaugh*, *supra*, squarely holds that a statutorily prescribed death-sentencing process which affirmatively restrains the jury's exercise of reasoned moral judgment in the ultimate choice of penalty violates the Eighth Amendment.

In petitioner's case, the jury could easily have found that the aggravating evidence was substantial, that the mitigating evidence was also substantial, but that the aggravating evidence "outweigh[ed it] just a little bit" as the prosecutor suggested.

RT 1279. Under the trial court's instruction as exploited by the prosecutor's voir dire catechism, these findings would have made a sentence of death the "legal decision" that "the state of California requires in this particular case," *ibid.*, leaving no room at all for the reasoned moral response required by the Eighth Amendment.

C. Respondent Invents Certain Purported Virtues Of The Mandatory Sentencing Instruction Which Are Wholly Illusory And Unsupported.

Respondent not only refuses to acknowledge any potential for constitutional impropriety in the mandatory sentencing instruction, but argues that the instruction (which, of course, the California Supreme Court no longer permits) has positive constitutional virtues. RB 72-75. Respondent declares that the mandatory sentencing instruction "provides a specific procedure (weighing aggravation against mitigation),[16] which insures that the death penalty will be imposed 'with regularity', rather than 'freakishly or rarely.'" RB 73. Respondent is correct that the unadorned mandatory sentencing instruction certainly results in *more frequent imposition* of the death penalty than does a process that permits the jury to exercise a reasoned moral response. (The Alameda County sentencing experience described in the CAP Amicus Brief clearly demonstrates this.) However, numerical *"frequency"* in imposition of the death sentence is not equivalent to constitutional "regularity," nor is frequency of imposition a constitutional virtue when achieved by mechanistic procedures that force juries to violate the law in order to express their reasoned judgment

[16] Respondent takes his eye off the ball by arguing as if the *weighing* provision itself was the target of petitioner's complaint. As noted below, petitioner *supports* a weighing exercise which *guides* but does not *dictate* the choice of penalty. It is only the mandatory sentencing directive superimposed on the otherwise instructive weighing exercise which interferes with the jury's determination of the appropriate punishment.

that the crime and the defendant do not deserve death. *Woodson* v. *North Carolina*, *supra*, 428 U.S. at 302-303; *Penry* v. *Lynaugh*, *supra*.

Respondent touts the mandatory sentencing instruction as a salutary safeguard against the vice of "unbridled discretion." RB 81-82. However, a statute *adequately* channels discretion where it merely narrows the determination of capital eligibility and then leaves the ultimate sentencing judgment to the jury's discretion. *Zant* v. *Stephens*, *supra*, 462 U.S. at 880. In contrast, the California capital sentencing scheme as it currently operates in light of *People* v. *Brown* (and without the former mandatory sentencing instruction challenged here) provides a number of *additional* channelling devices, well above the constitutional minimum, to safeguard against the specter of "unbridled discretion." See *Pulley* v. *Harris*, 465 U.S. 37, 51-53 (1984).[17] California now provides an illustrative list of relevant penalty consideration factors, and directs the jury to engage in the instructive exercise of weighing aggravation against mitigation to provide a comparison context for the ultimate penalty determination. The jury's discretion is thus *channelled* but not *overborne* by the list of factors (illustrative, not exhaustive) and the weighing instruction (hortatory, not

[17] Petitioner notes that the suggestion in the Amicus Brief of the Criminal Justice Legal Foundation that "the elimination of the mandatory sentencing instruction contributes to the *McClesky* problem" (CJLF Brief 22) is simply preposterous. Having corrected the factual errors contained in its brief as originally filed, CJLF still claims an ability to discern a "McClesky problem" based on a pool of 15 cases, an irresponsible inference even when qualified as "tentative". CJLF Brief 22. Petitioner proffers the Alameda County data as a demonstration of the raw unadulterated fact that the mandatory sentencing instruction would have resulted in 8 otherwise uncalled for death sentences in Alameda County. Petitioner's point does not rest on any statistical claim, but rather on readily observable reality. CJLF, in contrast, purports to divine a glimmer of an underlying process which can be documented, if at all, by statistical analysis of a very large sample of cases.

mandatory). Thus, respondent's invocation of the unadorned mandatory sentencing instruction as a bulwark against a regression to the Dark Ages of unbridled discretion is legally and factually untenable.

CONCLUSION

Wherefore for the foregoing reasons, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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